

91-219

No. ①

Supreme Court, U.S.  
FILED

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1991

**LAURENCE M. POWELL AND  
STACEY C. KOON,**

*Petitioners,*

*vs.*

**THE PEOPLE OF THE STATE OF CALIFORNIA**

*Respondents.*

PETITION FOR WRIT OF CERTIORARI  
TO THE CALIFORNIA COURT OF APPEAL  
SECOND APPELLATE DISTRICT, DIVISION TWO

**PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

Whether those states which permit a prosecutor to opt for either a grand jury indictment or the filing of an information as a means of bringing formal charges against felony criminal defendants violates these defendants' fourteenth amendment constitutional right to equal protection under the law in contrast to those accused of the same crimes who are provided a preliminary hearing?

PARTIES IN THE COURT BELOW

Laurence M. Powell and Stacey C. Koon were the defendants and petitioners in the court below. The people of the State of California were the complainants and respondents in the court below.

## TABLE OF CONTENTS

Question Presented .....	i
Parties Below .....	ii
Table of Authorities .....	v
Petition for Writ of Certiorari .....	1
Opinion Below .....	2
Jurisdiction .....	2
Constitutional Provisions and Statutes Involved ....	3
Statement of the Case .....	3
Reasons Why-a the Writ of Certiorari Should Issue .....	7

The issue this case presents -  
Whether a State may deny a felony  
defendant a preliminary hearing

who has been charged by  
indictment, and require a  
preliminary hearing for those  
charged of the same crime by  
information is a violation of equal  
protection - is of great importance ..... 7

Conclusion ..... 14

### TABLE OF APPENDICES

Constitutional provisions and  
statutes involved ..... A-1

Order of the Court of Appeal, Second  
Appellate District, Division Two for  
the State of California denying  
petitioners' request for relief in this  
matter in the form of a petition for  
writ of prohibition-mandate-stay ..... B-1

Order of the California Supreme  
Court denying petitioners' petition  
for a writ of Certiorari ..... C-1

TABLE OF AUTHORITIES

CASES

<i>Blair v. State</i> , 445 So.2d 1373 (1984) .....	7
<i>Braxton v. Peyton</i> , 365 F.2d 563 (4th Cir.) cert. den. 385 U.S. 939, 87 S.Ct 306, 17 L.Ed.2d 218 (1966) .....	8, 14
<i>Bullard v. State</i> , 533 S.W. 2d 812 (Cr.App. 1976) .....	8
<i>Burke v. Superior Court in and for Pima County</i> , 3 Ariz. App. 576, 577 416 P.2d 997, 998 (1966) .....	7
<i>Coleman v. Alabama</i> , 399 U.S. 1, 90 S.Ct. 1999 26 L.Ed.2d 387 (1970) .....	9, 10, 11
<i>Commonwealth v. Webster</i> , 337 A.2d 914 (1975) .....	8, 10
<i>Clark, State v.</i> , 291 Or. App. 231, 630 P.2d 810 cert. den. 454 U.S. 1084 (1981).....	8, 14

<i>Elk, State v.,</i> 298 N.W. 2d 87 (1980) .....	8
<i>People v. Franklin,</i> 35 Ill. Dec. 121, 80 Ill. App. 3d 128, 318 N.E. 2d 1071 (1979) .....	7
<i>Gerstein v. Pugh,</i> 420 U.S. 103, 95 S.Ct. 854 43 L.Ed.2d 54 (1975) .....	9
<i>Gooden v. State,</i> 425 S.W. 2d 645 (Cr.App. 1968) .....	8
<i>Guthrie v. Bowles,</i> 261 F.Supp. 852 (N.D. W.Va. 1967) .....	8
<i>Hawkins v. Superior Court,</i> 22 Cal.3d 584, 150 Cal.Rptr. 435, 586 P.2d 916 (1978) .....	11, 12, 13
<i>Keener v. State,</i> 598 S.W.2d 836 (1980) .....	8
<i>Lataille v. District Court of East Hampden,</i> 366 Mass. 525 320, N.E. 2d 877 (1974).....	7

<i>Lester, State v.,</i> 294 N.C. 220, 240 S.E.2d 391 (1978) .....	8
<i>McGee, State v.,</i> 757 S.W.2d 321 (App. 1988) .....	7
<i>Morris, State v.,</i> 329 N.E. 85, 42 OS 2d 307 71 OO 2d 294 (1975) .....	8
<i>State v. Tominaga,</i> 45 Haw. 604, 611 372 P.2d 356, 360 (1982) .....	7
<i>Wilhelm v. State,</i> 426 S.W. 2d 850 (Cr.App. 1968) .....	8
<i>Wood v. Georgia,</i> 370 U.S. 375, 82 S.Ct. 1364, 1373 8 L.Ed.2d 569 (1962) .....	13

### STATUTES

28 U.S.C. 1257(3) .....	2
Kan.Stat.Ann. § 22-2902 .....	7



Maryland	
Art. 27 § 592(b)(3) .....	7
Art. 27 § 592(b)(2) .....	7
Montana, R.C. § 46-11-101 .....	8
Nebraska, R.S. § 29-1607 (Supp. 1984) .....	8
Nevada, R.S. § 173.035 .....	8
Rhode Island, G.L. 12-12-1.7 .....	8
Wyoming, Rev. Stat. § 7-8-105 .....	8

## RULES

Idaho, R.Cr.P. 5.1(a) (1987) .....	7
Rhode Island	
Dist. Ct. R.Cr.P. 5(a) .....	8
Spr. Ct. R.Cr.P. 9.1 .....	8
Utah, R.Cr.P. 7.7(b) .....	8

No. \_\_\_\_\_

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

LAURENCE M. POWELL AND STACEY C. KOON,  
*Petitioners,*

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,  
*Respondents.*

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PETITION FOR CERTIORARI TO THE STATE OF  
CALIFORNIA COURT OF APPEAL, SECOND  
APPELLATE DISTRICT, DIVISION TWO

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Petitioners Laurence M. Powell and Stacey C. Koon respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal, Second Appellate District, Division Two for the State of California.

OPINION BELOW

This issue was presented to the Court of Appeal, Second Appellate District, Division Two for the State of California for relief in this matter in the form of a petition for writ of prohibition-mandate-stay. It was denied on April 22, 1991 and is attached hereto as appendix (B). Petitioners also sought this same relief in the Supreme Court for the State of California as a petition for writ of certiorari. This petition was denied on June 6, 1991 and is attached hereto as appendix (C).

JURISDICTION

Petitioners are defendants in the court of first instance, and petitioners in both of the state appellate courts below. As indicated, the highest state court from which a judgment on the merits could be obtained was the Court of Appeal, Second Appellate District, Division Two for the State of California. This petition is timely filed within 60 days of the date the California Supreme Court denied petitioners' petition. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

**CONSTITUTIONAL STATUTES AND PROVISIONS  
INVOLVED**

1) Constitution of the United States

Amendment 14, §1

Appendix (A)

2) Constitution of the State of California

Article 1, §14.1

Appendix (A)

**STATEMENT OF THE CASE**

The facts of this case have become the focus of nationwide attention. On March 3, 1991, the petitioners at bar, members of the Los Angeles Police Department, became engaged in a high speed pursuit of a suspect fleeing their attempts to halt him. Petitioners were ultimately part of a group of Los Angeles Police Officers and California Highway Patrolmen who coordinated their efforts to cause the suspect to stop. The driver of the suspect car was Rodney G. King.

On the basis of a video tape and other evidence presented, the Los Angeles County Grand Jury returned an indictment against petitioners on March 14, 1991 alleging assault with a deadly weapon, California Penal Code § 245(a)(1), and use of excessive force under color of state law, California Penal Code § 149. A third count of filing a false police report in violation of California Penal Code §118.1 was included as to petitioner Laurence Powell. A fourth count of filing a false police report in violation of California Penal Code §118.1 was included as to petitioner Stacey C. Koon. A fifth count charging petitioner Koon as an accessory after the fact in violation of California Penal Code § 32 was also included in the indictment.

On March 25, 1991, petitioners filed their respective demurrers to the indictment contending that it was vague, uncertain, and did not give petitioners or their counsel sufficient notice of the charges. Petitioner Koon's demurrer contested that the Sergeants' Daily Log, analogous to a diary, is not a police report as a matter of law within the intent of California Penal Code §118.1.

Along with the demurrers, petitioners filed their respective requests for a post-indictment

preliminary hearing. Petitioners contested that fundamental federal and state constitutional rights were implicated including due process, equal protection and assistance of counsel.

The next day, on March 26, 1991 the trial court overruled the petitioners' demurrers to the indictment and denied their request for a post-indictment preliminary hearing.

The trial court indicated that it neither reviewed the exhibits the Grand Jury received nor read the transcript of the Grand Jury's proceeding. To date, not all the exhibits have been provided to petitioners so that they can prepare their defense.

In denying the petitioners' request for a post-indictment preliminary hearing, the court agreed with the prosecution's argument that the recently enacted proposition 115 in California, now Art. I §14.1 to the California Constitution eliminated any right to a preliminary hearing. The trial court also agreed that an unsettled question of law existed as to whether the equal protection clause of the 14th amendment to the United States Constitution could permit a state to have a dual system for proffering charges by either indictment or information, with only the latter providing

a defendant with the benefits and protections of a preliminary hearing.

On April 17, 1991, petitioners filed an Emergency request for Stay and Petition for Peremptory Writ of Prohibition, Mandate, or other appropriate writ in the Court of Appeal, Second Appellate District, Division Two for the State of California challenging the trial court's decision overruling petitioners' demurrers and denial of their request for a post-indictment preliminary hearing. The petition was denied without comment on April 22, 1991. (Appendix B).

A petition for writ of certiorari to the California Supreme Court was filed on May 2, 1991. It was denied on June 6, 1991 (Appendix C). Petitioners now seek relief in this Court.

## REASONS WHY A WRIT OF CERTIORARI SHOULD ISSUE

THE ISSUE THIS CASE PRESENTS -  
WHETHER A STATE MAY DENY A  
FELONY DEFENDANT A PRELIMINARY  
HEARING WHO HAS BEEN CHARGED BY  
INDICTMENT, AND REQUIRE A  
PRELIMINARY HEARING FOR THOSE  
CHARGED OF THE SAME CRIME BY  
INFORMATION IS A VIOLATION OF  
EQUAL PROTECTION - IS OF GREAT  
IMPORTANCE.

In addition to California, a substantial number of the  
several states engage in this disparate treatment of  
felony criminal defendants.<sup>1</sup> These states afford certain

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<sup>1</sup> Twenty four states have provisions like or similar to California with respect to preliminary hearings to determine probable cause: Arizona, *Burke v. Superior Court in and for Pima County*, 3 Ariz. App. 576, 577, 416 P.2d 997, 998 (1966); Hawaii, *State v. Tominaga*, 45 Haw. 604, 611, 372 P.2d 356, 360 (1982); Idaho, R.Cr.P. 5.1(a) (1987); Illinois, *People v. Franklin*, 35 Ill. Dec. 121, 80 Ill. App. 3d 128, 318 N.E. 2d 1071 (1979); Kansas, Kan.Stat.Ann. 22-2902; Maryland, Art. 27 § 592(b)(3), Art. 27 § 592(b)(2); Massachusetts, *Lataille v. District Court of East Hampden*, 320 N.E. 2d 877, 366 Mass. 525 (1974); Mississippi, *Blair v. State*, 445 So.2d 1373 (1984); Missouri, *State v.*  
(continued...)



beneficial procedural safeguards to those defendants who receive a preliminary hearing in contrast to those who are charged by way of indictment. In practice, the good fortune which defendants enjoy in a preliminary hearing - to hear testimony and inspect tangible evidence proffered by the prosecutor to establish probable cause and to cross examine those witnesses and challenge probable cause - are completely lacking in the traditional grand jury proceeding followed in most of these states. The recipients of preliminary hearings gain another tactical advantage as well - they and their counsel can observe witness demeanor and evaluate the evidence to be presented against them. Thus they can more intelligently prepare and present their defense.

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<sup>1</sup>(...continued)

*McGee*, 757 S.W.2d 321 (App. 1988); Montana, R.C. § 46-11-101; Nebraska, R.S. § 29-1607 (Supp. 1984); Nevada, R.S. § 173.035; North Carolina, *State v. Lester*, 294 N.C. 220, 240 S.E.2d 391 (1978); Ohio, *State v. Morris*, 329 N.E. 85, 42 OS 2d 307, 71 OO 2d 294 (1975); Oregon, *State v. Clark*, 291 Or. App. 231, 630 P.2d 810 *cert. den.* 454 U.S. 1084 (1981); Pennsylvania, *Commonwealth v. Webster*, 337 A.2d 914 (1975); Rhode Island, G.L. 12-12-1.7, Dist. Ct. R.Cr.P. 5(a), Spr. Ct. R.Cr.P. 9.1; South Dakota, *State v. Elk*, 298 N.W. 2d 87 (1980); Tennessee, *Keener v. State*, 598 S.W.2d 836 (1980); Texas, *Gooden v. State*, 425 S.W. 2d 645 (Cr.App. 1968), *Wilhelm v. State*, 426 S.W. 2d 850 (Cr.App. 1968), *Bullard v. State*, 533 S.W. 2d 812 (Cr.App. 1976); Utah, R.Cr.P. 7.7(b); Virginia, *Braxton v. Peyton*, 365 F.2d 563 (4th Cir.) *cert. den.* 385 U.S. 939, 87 S.Ct 306, 17 L.Ed.2d 218 (1966); West Virginia, *Guthrie v. Bowles*, 261 F.Supp. 852 (N.D. W.Va. 1967); Wyoming, Rev. Stat. § 7-8-105.

Indeed, this court has held that even though due process requirements do not mandate that a defendant be given a preliminary hearing, *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), if a preliminary hearing is afforded a defendant, it is a critical stage at which a defendant must be assisted by counsel. *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970). In deciding that a preliminary hearing is a critical stage, the *Coleman* court noted all the perils which can affect a criminal defendant at a preliminary hearing. The court also noted the advantages of the proceeding in the context of how counsel can be essential:

First, the lawyer's skilled examination and cross-examination of witnesses in the State's case that may lead to the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination at the trial, or preserve testimony favorable to the accused of a witness who does not appear at trial. Third, trained counsel can more effectively discover the case the

State has against his client and make possible the preparation of a proper defense to meet that case at trial.

*Coleman v. Alabama*, 399 U.S. 1, 9, 90 S.Ct. 1999, 2003, 26 L.Ed.2d 387, \_\_\_, (1970).

In contrast, those defendants who face exactly the same charges but are charged through the grand jury indictment process are denied all of the benefits accorded to their counterparts charged by information. Moreover, courts have modernly reevaluated the traditional perception of the grand jury as the "bulwark of liberty and guardian of the innocent from oppression by the State." *Commonwealth v. Webster*, Pa. 337 A.2d 914, 917, citing *Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 1373, 8 L.Ed.2d 569 (1962).

In *Webster*, the Pennsylvania Supreme Court rejected a petitioner's claim that he was denied equal protection under the law because he was charged by information and provided a preliminary hearing. The court noted that in the reality of the present day, an accused is likely afforded more protections through the information and preliminary hearing process than through the indictment process. *Webster*, at 918. The *Webster* court also

observed that "[r]ealistically, the grand jury does not serve any protective screening function for "any experienced prosecutor will admit that he can indict anybody at any time for almost anything before a grand jury.'" *Webster* at 918 citing *Campbell, Delays in Criminal Cases*, 55 F.R.D. 229, 253 (1972).

Prior to the legislation contested here, California required preliminary hearings for all defendants regardless of the manner prosecutors chose to formally bring charges. *Hawkins v. Superior Court*, 22 Cal.3d 584, 150 Cal.Rptr. 435, 586 P.2d 916 (1978). Under virtually identical provisions for equal protection found in the California State Constitution as in the United States Constitution, the California Supreme Court found that the notion of an independent grand jury was a fantasy. Justice Mosk observed that "between January 1, 1974 and June 30, 1977, 235 case were presented to the San Francisco Grand Jury and indictments were returned in all 235." *Hawkins*, at 590.

Intrinsic to the nature of a grand jury are its conflicting duties. In one role, "Basically the grand jury is a law enforcement agency," *United States v. Cleary*, 265 F. 459, 461 (2nd Cir. 1959), "participating in the prosecutorial task of discovering criminal conduct and

the perpetrators thereof; putting on its other hat, the grand jury is expected to be a neutral body, protective of the individual against prosecutorial abuses." *Hawkins*, at 591. "It seems self evident that to the extent it succeeds at one function it must fail at the other." *Id.*

Indeed, grand jury proceedings provide prosecutors with tactical advantages which they do not enjoy in the preliminary hearing. Without question, the grand jury indictment procedure "can only be characterized as a prosecutor's Eden: he decides what evidence will be heard, how it is to be presented, and then advises the grand jury on its legal significance." *Hawkins*, at 592.

More importantly, the court continued further,

[i]n sharp contrast are information procedures in which the defendant is entitled to an adversarial, judicial hearing that yields numerous protections, including a far more meaningful probable cause determination. Yet the prosecuting attorney is free in his unfettered discretion to choose which defendants will be charged by indictment rather than information and consequently which catalogue of rights, *widely disparate though they*

*may be*, a defendant will receive. He may act out of what he believes to be proper law enforcement motives, or he may act whimsically; no case law or statutory guidelines exist to circumscribe his discretion.

*Id.* (emphasis added).

Petitioners submit that apart from proper motivations and possible whim, this case presents a third, unmentioned consideration for a prosecutor: manifest political pressure.<sup>2</sup> This political pressure only exacerbates the disparity of these two divergent grand jury duties. Its obligation to protect the individual defendants is totally eclipsed by the combined zeal of both the prosecutor and the public to assess culpability.

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<sup>2</sup> This Court has previously noted the ability for a grand jury to be affected by political dialogue. *Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962).

CONCLUSION

This is the third time this Court has been asked to decide this issue.<sup>3</sup> These recurring petitions for review indicate it is more than a transient concern. The issue affects a substantial number of defendants in a substantial number of the several states. Because the disparity in procedural protections between the two alternative procedures in modern application is real and substantial, the writ of certiorari should issue.

Dated: August 2, 1991

Respectfully Submitted,

Patrick J. Thistle

*Counsel of Record for Petitioners*  
LAURENCE M. POWELL and  
STACEY C. KOON

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<sup>3</sup> *Braxton v. Peyton*, 365 F.2d 563 cert. den. 385 U.S.939, 87 S.Ct. 306, 17 L.Ed.2d 218 (1966), *State v. Clark*, 291 Or. 231, 630 P.2d 810, cert. den. 454 U.S.1084.

## APPENDIX A



## APPENDIX A

### 14th Amendment to the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### Article I § 14.1 to the California Constitution :

If a felony is prosecuted by indictment, there shall be no post-indictment preliminary hearing.

## APPENDIX B

-B-1-

OFFICE OF THE CLERK  
COURT OF APPEAL  
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT  
ROBERT N. WILSON, CLERK

DIVISION 2 DATE: 04/22/91

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RE: Powell, Laurence M. Et Al.  
VS.  
S.c.l.a.  
People, the  
2 Criminal B057731  
Los Angeles No. BA035498

THE COURT:

The petition for Writ-Mandate-Stay is denied. —

## APPENDIX C

-C-1-

Second Appellate District, Division Two, No. B057731  
S020805

FILED: June 6, 1991  
(Robt. Woodruff, Clerk)

IN THE SUPREME COURT OF  
THE STATE OF CALIFORNIA

IN BANK

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LAURENCE M. POWELL, Petitioner

v.

LOS ANGELES COUNTY SUPERIOR COURT,  
Respondent

THE PEOPLE, Real Party in Interest

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Petition for review DENIED (June 6, 1991)

Mosk, J. is of the opinion the petition should be  
granted.

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Chief Justice